

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

FIELD SUPPORT SERVICES, INC.

Employer-Petitioner

and

Case No. 29-UC-526

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 30, AFL-CIO**

Union

DECISION AND ORDER

Since January 1, 2004, Field Support Services, Inc., herein called the Employer-Petitioner or the Employer, has been providing operations and maintenance services, including ferry services, to the Plum Island Animal Disease Center, Plum Island, New York, herein called Plum Island, pursuant to a contract with the United States Department of Homeland Security. The International Union of Operating Engineers, Local 30, AFL-CIO, herein called the Union, is the exclusive collective bargaining representative for the following contractual unit:

Included: All full-time and regular part-time Able Bodied Seaman, Able Bodied Seaman/Mechanic, Bio-Systems Mechanic, Boiler Operator, Carpenter/Painter (inside lab) Carpenter/Mason/Painter, Cook I, Cook II, Custodian, Custodian/Lab Support, Decontamination Plant Operator, Electrician, Electronic Technician, Food Service Worker, General Maintenance Worker, Glassware Worker, Grounds Laborer/Laborer, HAZMAT Technician, Heavy Equipment Operator, HVAC Mechanic, Laundry Worker, Lead Boiler Operator, Lead Decontamination Plant Operator, Lead Electrician, Lead Motor Vehicle Mechanic, Lead Water/Wastewater Plant Operator, Maintenance Helper, Maintenance Mechanic, Marine Mechanic, Metal Worker, Motor Vehicle Mechanic, MP2 Tech, Ordinary Seaman, Pipefitter/Plumber, Telecommunication Technician, Trades Helper, Truck Driver, Warehouse Clerk/Forklift Operator, WW/PW Plant Operator, and WW/PW Assistant employed by the Employer at its Plum Island, New York, facility.

Excluded: All other employees, Secretary, Payroll Clerk, Accounting Clerk III, Personnel/Accounts Payable Clerk, Secretary (Quality Assurance/Safety), Safety and Occupational Health Specialists, Clerk-Typist I, Receptionist/Customer Service, EMT/Guards, Guards, Photographer, Hospitality Manager, Transportation Manager, Technical Systems Manager, Systems Technician, and Supervisors as defined in Section 2(11) of the Act.

The Employer has filed the instant petition under Section 9(b) of the National Labor Relations Act, herein called the Act, seeking to clarify the bargaining unit by excluding the masters and lead masters on the ground that they are supervisors as defined in Section 2(11) of the Act. The Union disagrees, contending that the masters and lead masters are non-supervisory employees.

A hearing was held before Henry Powell, a Hearing Officer of the National Labor Relations Board, herein called the Board. In support of its argument that the masters and lead masters are supervisors, the Employer-Petitioner called three witnesses to testify: Charles Lacour, lead master, Bernard Patenaude,¹ master, and David Henry, transportation manager. The witnesses were largely consistent in their testimony, which supported the Employer-Petitioner's theory. The Union did not present witnesses. Both parties submitted briefs.

As discussed in detail below, I have concluded that the masters and lead masters are statutory supervisors. I will therefore grant the Employer's petition for clarification and exclude them from the bargaining unit.

Because the facts set forth below are applicable to both the masters and lead masters, they are referred to interchangeably as "masters."

¹ The Hearing Officer granted the Employer-Petitioner's unopposed request to interrogate Patenaude by leading questions as a witness identified with an adverse party, pursuant to Rule 611(c) of the Federal Rules of Evidence. It appears from the record that Patenaude, a member of the Union, appeared at the hearing at the Union's behest.

FACTS

Since January 1, 2004, the Employer has been providing ferry service between Orient Point, New York, Old Saybrook, Connecticut, and Plum Island. The ferries transport passengers, who work at Plum Island, as well as vehicles loaded with cargo. The cargo contained in the vehicles includes chemicals, some of which are hazardous, and biologicals, including livestock and animal tissue used for testing and training.² In addition, each vessel carries 7,500 gallons of fuel.

The Employer's Plum Island ferries are operated by five masters, also known as captains, who hold master's licenses issued by the United States Coast Guard. Reporting to the masters are 12 to 14 deck hands, encompassing ordinary seamen, able-bodied seamen and able-bodied seamen-mechanics. Coast Guard regulations prohibit the ferries from operating without a master and at least two deck hands.

The record reflects that the masters are in absolute control of the ferries to which they are assigned, bearing full responsibility for the safety of the vessel, crew, passengers and cargo. Although they must comply with applicable governmental regulations³ and with the Employer's policies,⁴ the masters exercise considerable discretion in interpreting them.

Each morning, the masters check the condition of the vessels. If a vessel is not seaworthy, the master can decline to operate it. The masters determine the best routes to follow, at what speed, and how many passengers the boats can handle. Throughout the

² Animal tissue that is under suspicion of being diseased is ferried separately.

³ These include regulations of the U.S. Coast Guard, the U.S. Department of Transportation and the U.S. Environmental Protection Agency.

⁴ The Employer's operations manual (in evidence) and its contract with the United States Department of Homeland Security (not in evidence) are among the documents setting forth the guidelines governing the masters.

day, the masters issue orders to the deck hands with regard to the loading, placement and securing of cargo, the boarding of passengers, the posting of lookouts, and the maintenance, repair, fueling, launching, docking, securing , steering and piloting of the vessel (the latter task is also performed by the masters). In assigning and directing crew members in these various tasks, and in deciding how best to perform these tasks, the masters consider such factors as the experience level and number of crew members, the unique characteristics of each vessel, the traffic density, weather and visibility, currents and wave heights, the cargo, the number and location of the passengers, the condition of the dock or ramp, and the applicable regulations.

In inclement weather, the masters have the discretion to discontinue operations, reroute, delay or abort a trip. They may also reroute in the event of medical emergencies or mechanical problems. In addition, they have the authority to refuse to transport cargo-carrying vehicles, in light of their weight, stability, contents or condition, or other considerations, such as the weather. When the masters receive distress signals from other boats, they are responsible for deciding whether to respond, based on considerations such as proximity, safety, weather conditions, the depth of the water, and whether other vessels are responding. When they do respond, the masters must quickly devise a plan and allocate the necessary tasks among their crew members. In the event of a fire on a vessel, the masters are responsible for formulating a “plan of attack” and assigning crew members to fight the fire and attend to the passengers.

In addition, the masters provide crew members with training, and with practice safety drills required by the U.S. Coast Guard. The masters determine how and when to run these drills, and whether the deck hands’ performance on these drills requires more

frequent repetition. Tasks practiced during the drills are allocated among the deck hands by the masters.

The masters bear full responsibility for ensuring that crew members follow their orders and carry out their tasks properly and safely, and the deck hands are required to follow the masters' instructions. If a deck hand is not performing his duties properly, or is consistently late, the master is responsible for correcting, instructing and counseling him. When a vessel is in operation, the master is mindful that a crew member's actions, or inactions, could potentially cause a fire, an accident, or a fuel or chemical spill, resulting in injury, loss of life, or damage to the vessel, the cargo, the dock, or the environment. Even if the master is not directly at fault, he is held responsible for anything that happens on the vessel. Thus, the misconduct of a deck hand could result in the suspension or revocation of the master's Coast Guard license, a fine, or disciplinary action by the Employer against the master.

Further, the masters have the power to order off-duty employees to report to work, when staffing is inadequate, even if it entails working overtime. Conversely, they have the authority to grant employees' requests to leave work early, if there is sufficient crew on hand. In addition, the masters sometimes arrange among themselves to temporarily transfer crew members from one boat to another, based on their unique skills and abilities or other factors. If a deck hand refuses an order, or is inebriated or unruly, the master has the authority to remove him from the boat. The masters are not required to consult with senior management in these situations.

DISCUSSION

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1866 (2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. *See Chicago Metallic*, 273 NLRB 1677, 1688, 1689 (1985). Accordingly, under Section 2(11) of the Act, employees are statutory supervisors only if (1) they hold the authority to engage in one of the twelve supervisory functions set forth in the Act, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” *Kentucky River*, 121 S.Ct. at 1867.

Under this three-part standard, although “assign” and “responsibly direct” are among the listed functions sufficient to establish supervisory status, the assignment of tasks in accordance with an Employer’s set practice, pattern or parameters does not require a sufficient exercise of independent judgment to confer supervisory authority. *See Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). Similarly, the degree of independent judgment required to direct employees in the performance of routine, repetitive tasks is correspondingly reduced. *Loyalhanna Health Care Associates*, 332 NLRB No. 86, slip op. at p. 3 (2000); *Ten Broeck Commons*, 320 NLRB 806, 811 (1996). Further, to establish the “responsible” element of responsible direction, it is necessary to prove that the alleged supervisor “is held fully accountable and responsible for the performance and work product of the employees he directs.” *Schnurmacher Nursing Home*, 214 F.3d 260, 267 (2^d Cir. 2000).

Relevant factors in determining whether the captains or pilots of vessels are supervisors include whether they are responsible for the operation of the vessel, whether they can issue orders to crew members without consulting with others, whether they are held accountable for crew members' misconduct, whether the failure to follow their orders can result in discipline, and whether their decisions regarding the operation of the vessel are based on the analysis of non-routine factors such as weather, currents, cargo, traffic, the condition of the vessel, and crew members' level of experience. *See Spentonbush/Red Star Companies*, 106 F.3d 484 (2d Cir. 1997); *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *Alter Barge Line, Inc.*, 336 NLRB 1266 (2001), *Ingram Barge Company*, 336 NLRB 1259 (2001). The requirement that a captain or pilot comply with Coast Guard regulations does not diminish his independent judgment, inasmuch as the interpretation of these regulations requires judgment and discretion. *See American Commercial Barge Line*, 337 NLRB at 1071.

In the instant case, the masters and lead masters issue orders to the deck hands on a daily basis, based on a complex array of factors. They exercise discretion and judgment in evaluating changing situations, assigning employees to handle them, and interpreting U.S. Coast Guard and other regulations. They are empowered to change employees' schedules, temporarily reassign them, and determine when training drills will be held. Such actions do not need approval from higher management.

Significantly, the deck hands are required to follow the masters' orders, and the masters are responsible for ensuring that they do so, in a safe and competent manner. In light of the potentially catastrophic consequences of employee misconduct, the masters

are held responsible for such misconduct and can lose their licenses as a result of the mistakes of their crew members.

Based on the foregoing, I find that the masters and lead masters possess the authority to assign and responsibly direct employees, and, in doing so, they use independent judgment. Therefore, they are supervisors as defined in Section 2(11) of the Act. Accordingly, I will grant the Employer's petition for clarification and exclude masters and lead masters from the bargaining unit.

CONCLUSIONS AND FINDINGS

Upon the entire record in this proceeding, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that Field Support Services, Inc. is a domestic corporation, with its principal office and place of business located at 6303 Ivy Lane, Suite 800, Greenbelt, Maryland, and an office and place of business located at Plum Island, New York, herein called its Plum Island facility, where it has been engaged in providing operations and maintenance services to the Plum Island Animal Disease Center, United States Department of Homeland Security, which exerts a substantial impact on national defense. Based upon a projection of its operations since January 1, 2004, at which time the Employer commenced operations at Plum Island, the Employer will annually purchase and receive at its Plum Island facility, goods, supplies and materials valued in excess of \$50,000, from points located outside the State of New York. I find that the Employer-Petitioner is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. International Union of Operating Engineers, Local 30, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.

4. In accordance with the discussion above, I conclude that the masters and lead masters are supervisors as defined in Section 2(11) of the Act, and that they must be excluded from the unit.

ORDER

Accordingly, IT IS HEREBY ORDERED that the petition to clarify the bargaining unit at Plum Island, to exclude masters and lead masters, is granted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **February 22, 2005**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: February 7, 2005, Brooklyn, New York.

Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

APPENDIX

The transcript is hereby amended as follows:

<u>Page</u>	<u>Line</u>	<u>Transcript Version</u>	<u>Corrected Version</u>
Throughout		Isle	Island
Throughout		Plumb	Plum
6	13	immense	events
14	13	main lands	mainland
20	3-4	Collective Bargaining Unit employees	Collective Bargaining Agreement
23	19	masses	masters
	19	somewhere	subsumed
	25	UOP	ULP
24	2	UOP	ULP
26	2	openly	ultimately
29	11	digression	discretion
33	6	matter	manner
35	16	position	positioning
35	25	they	may
36	25	desks	decks
43	25	if	is
47	19	no	not
52	23	what	that
64	22	approval of party	approval authority
65	12	digression	discretion

72	9	DLT	DOT
77	20	Not	No,
79	25	he	you
83	8	Q	A
	10	A	Q
	11	Q	A
	12	A	Q
	13	Q	A
	14	Gainings or confidence	gaining some confidence
	19	as	at
88	18	You were also if	You were also asked if
90	1	irrelevant	relevant
91	14, 15	lies	lines
	25	going	giving
	25	liking	linking
94	11	complaints	constraints
98	17	but	that
	18	affect	affecting
	25	As if	And if
99	1	and	in
	2-3	I could that	I could do that
100	13	i	in
	17	that	to
105	14	thin	think
	19	an	and

105	21	if Thought	If I thought
106	13	but	book
108	15	asking	acting
	19	The	They're
109	16	scheduled	schedules
112	19	on	are an
	20	bring	bringing
113	10	training	trained
115	14	Able-bodies	Able-bodied
	16	your	you
116	25	bee	been
117	21	the	they
120	11	able-bodies	able-bodied
125	6	waster	waste
	18	one	on
129	8	-- Point	Orient Point
130	8-9	-- Point	Orient Point
	16	-- Point	Orient Point
150	15	It	I
172	21	if	is
185	3	be	we
192	4	it	is
196	3	contaging	contagion

197	19	as	at
200	2	I	If
206	22	anther	another
209	16	Go	no
211	10	you've	you're
	22	distress boater	distressed boat
242	11	openly	ultimately
256	22	different judgment	independent judgment
274	6	knows	knots
274	13	got phone call him	got a phone call from him
281	25	master	masters
282	15	day drift	dangerous
296	7	experience	experienced
298	11	2550	\$25.50
	12	2550	\$25.50
299	12	2550	\$25.50
318	19	CVA	CBA
334	8	he	the
349	18,19	CVA	CBA
350	2	CVA	CBA